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INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS,

Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

MARGARET E. WOODWARD *
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: (504) 525-9538
Attorney for Petitioners International Primate Protection League and its Members, People for the Ethical Treatment of Animals and its Members, Alex Pacheco, and Louisiana in Support of Animals and its Members

*Counsel of Record

Of Counsel:

GARY L. FRANCIONE
Rutgers – The State University of New Jersey
School of Law – Newark
15 Washington Street
Newark, NJ 07102
(201) 648-5321

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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TABLE OF CONTENTS

Page

Table of Authorities ii

Argument:

A. State Courts have long been entrusted with federal questions and are competent to decide them..... 1

B. The statutory language and history do not support Respondents' arguments 4

C. Federal interests will not be impaired by a remand of this case to state court 10

D. Sound policy reasons dictate the adjudication of state claims against an agency in state court ... 17

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Allen v. Allen, 291 F. Supp. 312 (S.D. Iowa 1968) 9

Allen v. McCurry, 449 U.S. 90 (1980).....3, 12

Arizona v. Manypenny, 451 U.S. 232 (1981)..... 17

Brooks v. Dewar, 313 U.S. 354 (1941)..... 10

Camacho v. Autoridad de Telephonos de Puerto Rico, 868 F.2d 482 (1st Cir. 1989)..... 4

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) ..18, 19

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1988)..... 2

Claflin v. Houseman, 93 U.S. 130 (1876)..... 2

Colorado v. Symes, 286 U.S. 510 (1932)..... 5, 6, 17

Franchise Tax Bd. of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).....10, 16

Great N. Ry. Co. v. Alexander, 246 U.S. 276 (1918).... 15

Gully v. First Nat'l Bank, 299 U.S. 109 (1936) ..9, 12, 13

Harlem River Produce Co. v. Aetna Casualty & Sur. Co., 257 F. Supp. 160 (S.D.N.Y. 1965)..... 4

Houston v. Moore, 18 U.S. (5 Wheat) 1 (1820)..... 2

Johnson v. Showers, 747 F.2d 1228 (8th Cir. 1984)..... 5

KCPO Employees Credit Union v. Mitchell, 421 F. Supp. 1327 (W.D. Mo. 1976) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377 (1922)..... 10

Lowe v. Norfolk & Western Ry. Co., 529 F. Supp. 491 (S.D. Ill. 1982)..... 5

Maine Ass'n of Interdependent Neighborhoods v. Commissioner of Maine Dep't of Human Services, 876 F.2d 1051 (1st Cir. 1989)..... 8

McGlynn v. Employers Commercial Union Ins. Co. of America, 386 F. Supp. 774 (D.P.R. 1974)..... 8

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) 3, 15, 16

Mesa v. California, 489 U.S. 121 (1989)..... 11, 19, 20

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)..... 14

Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989).....4, 13

United States v. Inciardi, 258 F. Supp. 837 (W.D. Okla. 1966)..... 16

United States v. Pennsylvania Dep't of Envtl. Resources, 923 F.2d 1071 (3d Cir. 1991)..... 16

United States v. Skipper Smith's Marina, Inc., 283 F. Supp. 408 (S.D. Fla. 1968) 15

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)..... 19

Wheedlin v. Wheeler, 373 U.S. 647 (1963)..... 10

Willingham v. Morgan, 395 U.S. 402 (1969).....5, 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art III 1, 12, 19

U.S. Const. art. VI 3

STATUTES

Act of Mar. 3, 1875, §1, 18 Stat. 470 3

15 U.S.C. §634 15

28 U.S.C. §1332 15

28 U.S.C. §1345 7

28 U.S.C. §1441 ..... 4, 10, 15, 18

28 U.S.C. §1442 ..... *passim*

28 U.S.C. §2201 16

MISCELLANEOUS

Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385 (1964) 1

Fallon, *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141 (1988) 1

The Federalist, No. 82 (A. Hamilton) (Bourne ed. 1901) 2

Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 1

Hart & Weschler, *The Federal Courts and the Federal System* (1953) 1

13A Wright, Miller and Cooper, *Federal Practice & Procedure*, §3536 (1984) 12

ARGUMENT

A. State Courts have long been entrusted with federal questions and are competent to decide them.

Underlying most of Respondents' arguments in this case is a profound mistrust of the state courts' competence to adjudicate federal defenses. This fundamental suspicion runs counter to constitutional history and mainstream federalist thinking.

The framers of the original Constitution regarded the states as important – and in many ways as the primary – entities of government. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 491 (1954); Fallon, *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1153 (1988). While delegating an enumerated set of functions to the national government, the framers left the states the "responsibility for dealing, and . . . [the] authority to deal, with the whole gamut of problems cast up out of the flux of everyday life." Hart, 54 Colum. L. Rev. at 491. Included among the states' responsibilities was their role as "the primary guarantors of constitutional rights." Hart & Weschler, *The Federal Courts and the Federal System* 339 (1953).

The federal courts are of limited, circumscribed jurisdiction. Only this Court has constitutional standing; the creation of all other federal courts was left to the discretion of Congress, as was the enumeration of their powers, within the confines of Article III of the Constitution. Hart & Weschler, at 10-11.[1] By contrast, the state courts are repositories of general jurisdiction, conferred upon them not by Congress, but by the sovereign people of the respective states. *Id.* and Arnold, *The Power of State*

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[1] The constitutional debate over whether federal trial courts should be created at all, because they might unduly interfere with the jurisdiction of state courts, was resolved by the "Madisonian Compromise," leaving creation of the lower federal courts to the discretion of Congress. *Id.*

Courts to Enjoin Federal Officers, 73 Yale L. J. 1385, 1398 (1964). Absent an explicit prohibition by Congress, state courts were, and are, to have concurrent jurisdiction in all cases arising under the laws of the United States. These principles were enumerated by Alexander Hamilton in Number LXXXII of *The Federalist*, in a passage repeatedly approved by this Court:[2]

> I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

[2] 2 *The Federalist* 130, 132 (Bourne ed. 1901). *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508, n.5 (1962); *Claflin v. Houseman*, 93 U.S. 130, 138 (1877); *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 25-26 (1820).

It was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction. Act of Mar. 3, 1875, §1, 18 Stat 470. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986). Under that legislation, a large body of federal issues continue to be adjudicated by state courts, including those arising under state law in which a federal defense is asserted or a federal issue is presented as an element of a state claim. *Id.*

In these and in the host of other cases in which state courts confront federal questions, they are bound by the supremacy clause, which states that the Constitution, laws, and treaties of the United States "shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI.

Thus, the state courts would be obligated to uphold any legitimate federal defense asserted by Respondents. Their implicit suggestion that the state courts cannot or will not properly discharge that function is in direct conflict with "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, **and its expression of confidence in their ability to do so.**" *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (emphasis supplied) and cases cited therein.

Because the Constitution presupposes the state courts' fitness to adjudicate federal issues and the federal courts may only relieve the state courts of jurisdiction by express statutory direction, the federal officers removal statute should only be read to apply to NIH or Tulane if it clearly so provides. As discussed below, Respondents

have struggled to create ambiguity in the statutory language and history, and hope to extract from that ambiguity an expansive reading of the statute. But the fact of the ambiguity alone defeats their argument, for federal courts, as courts of limited jurisdiction, cannot expand their jurisdiction except by clear, Congressional mandate. In the words of 28 U.S.C. §1441(a): "Except as **expressly** provided by Act of Congress" a case is not properly removed to federal court unless it might have been brought there originally. (emphasis supplied). *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 848 (1989).

B. The statutory language and history do not support Respondents' arguments.

Respondents' arguments concerning the interpretation of 28 U.S.C. §1442(a) have been reviewed and dismissed by the majority of courts that have considered them, leading to a consensus, from which the Fifth Circuit has deviated, that this provision concerns the right of removal by federal *officers* and not by federal agencies. These courts have noted that respondents' proffered interpretation distorts the language of the statute, ignores its title, glosses over or misinterprets its history and calls for a redirection of policy that should come from the legislature and not from the courts.

Petitioners' Brief on the Merits noted that most of the circuit court cases cited by Respondents are not dispositive or helpful to the resolution of this issue, as removal was not challenged. *See Harlem River Produce Co. v. Aetna Casualty & Sur. Co.*, 257 F. Supp. 160, 163 n.2 (S.D.N.Y. 1965) ("since the removal petitions in those cases were not contested, their value in determining the instant question is minimal.") Others did not address whether removal was available to federal officers and not to federal agencies, but whether suits could be removed by "private persons . . . who act under the direction of federal officers," *Camacho v. Autoridad de Telephonos de*

Puerto Rico, 868 F.2d 482, 486 (1st Cir. 1989), or accepted the government's unopposed view that a suit brought against an agency "should be deemed as one brought against" that agency's director. *Johnson v. Showers*, 747 F.2d 1228, 1229 (8th Cir. 1984).

Petitioners reiterate their argument that the language, syntax and punctuation of the statute indicate that a federal agency does not have the right to remove. Courts have previously considered the arguments for this right to be extended to agencies and have rejected this appeal and the reliance on cases cited by respondents. For example, *KCPO Employees Credit Union v. Mitchell*, 421 F. Supp. 1327, 1329-30 (W.D. Mo. 1976) focused the discussion correctly:

> The question in this case is not whether Section 1442(a)(1), the federal officer removal statute, is to be given a "narrow" or a "limited" construction, see *Colorado v. Symes*, 286 U.S. 510, 517, 52 S.Ct. 635, 76 L.Ed. 1253 (1932), or whether Section 1442(a)(1) should be given a "narrow, grudging interpretation," *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed. 396 (1969). The question presented is simply whether Section 1442(a)(1), the federal officer removal statute, can be read as conferring a right of removal on "any agency" of the United States.

Rejecting the "authority" for expanding the scope of the statute, the court concluded that "§1442(a)(1) simply cannot be given such a tortured reading." *Id.* at 1330. *Lowe v. Norfolk & Western Ry. Co.*, 529 F. Supp. 491, 494 n.1 (S.D. Ill. 1982), reached a similar conclusion by rejecting the applicability of *Willingham*, "since the question here is whether the explicit language of the statute confers the right of removal in the first instance." The court has to determine the "threshold question" of "whether an 'officer' includes the agency itself," *id.*, a proposition that the *Lowe* court rejected.

Respondents' arguments concerning interpretation of the statute in light of legislative history also fail (NIH

Brief at 16). The *KCPO* court noted that *Willingham*, 395 U.S. at 407 and *Symes*, 286 U.S. at 517, do not aid Respondents' arguments. Respondents ask the Court to note that "the statutory title is not a reliable guide to interpretation" (NIH Brief at 17 n.10) and that "[d]espite its title, the scope of §1442 clearly is not limited to actions against federal officers." Even though a statute's clear title is not always definitive of its content, NIH goes too far in suggesting that because the different sections of §1442(a) address removal in various situations, "Congress intended to allow removal of the broad array of governmental actions taken under color of office." *Id.* Respondents neglect to note that all the provisions concern *officers* or those holding rights derivatively from *officers*. For this reason, *Willingham* urged a construction of the statute "to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. at 406-07. There is no mention of any right of removal for agencies in the statute, and the provisions of the statute should not be strained to provide for such a right.

Respondents argue that because an officer of an agency of the United States is an officer of the United States, our reading of the statute renders redundant the phrase "or any agency thereof" in the statute's allowance of removal by "any officer of the United States or any agency thereof". However, when the statute was enacted in 1948, following the creation of a host of new agencies, the added clause may have been thought necessary to emphasize that the right of removal was being extended not only to officers of the executive branch but also to those of independent agencies.

Congressional intent must surely be discerned from the face of the statute in light of its legislative history. Respondents believe that the legislative history is ambiguous and, like their misinterpretation of the statute itself, that it allows for the possibility that Congress drafted a statute to allow agencies to remove. The Reviser's Notes

suggest no such thing, only that whereas "§76 of Title 78, was limited to revenue officers engaged in the enforcement of the criminal or revenue laws", the revised section "is extended to apply to all officers and employees of the United States or any agency thereof." This was a broadening of the categories of officers covered; had Congress intended to create a new right of removal for federal agencies, surely the drafters would have addressed so significant a change in the Notes.

Respondent NIH insists that as the statute was revised at a time when there were increased opportunities to sue federal agencies in state court, the changes in the federal *officer* removal statute must be read to include agencies' right of removal. It is not sufficient to suggest what Congress might have done with reference to social context when Congress failed to make such a change in the removal statute.

NIH also looks to 28 U.S.C. §1345, to show that federal agencies by that time could sue or be sued, and thereby suggests that agencies should be entitled to remove to federal court. This section directly contradicts the position for which it is cited by NIH. It shows that Congress knows when to add the word "agency" to give it the grammatical purpose that respondents ascribe to it in §1442(a)(1). The Reviser states that the

> Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government.

No such explanation is given in the Notes to §1442(a).

> The provisions of §1345 apply to
> all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof

thereby indicating that Congress knew where to place a comma or how to use a prepositional phrase in order to include an agency itself within the ambit of a statute. Respondents wish to point to §1345 as a clear indication of the inclusion of agencies, but would have Congress

mired in ambiguity and obfuscation when it came to section 1442, although both sections' revisions were passed into law on June 25, 1948.

Respondents may have policy arguments that might be appealing to Congress, but it would be for Congress to make further changes in the statute.[3] The majority of courts have decided that they should not make such changes on behalf of Congress by including an agency's right of removal under §1442(a)(1). Respondents argue that, even if the statute cannot be construed to give agencies a right of removal, NIH is a person acting under a federal officer, tracing the chain of command from the Director of NIH to the Secretary of Health and Human Services to the President himself. The interpretation of the word "person" is determined by the intent of the legislature as expressed in the statute at issue, on an essentially *ad hoc* basis. In this case, it simply strains the language and derivation of the statute to conclude that Congress accorded a right of removal to agencies in so obscure and indirect a fashion.

IBR and Tulane argue that Tulane also is a "person" acting under an officer of the United States, and thus enjoys an independent right of removal under §1442(a). Cases supporting such an interpretation, some purposely, many unwittingly, are collected at page 35 of IBR's brief.[4]

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[3] Congress has adverted to the possibility of agency removal in certain statutes, suggesting both that Congress does not construe section 1442 to provide a general right of agency removal, and that it only considers such a right necessary in limited circumstances. *See* NIH Brief at 29 n.25.

[4] IBR's ostensibly thorough survey failed to reveal any of the cases refusing to adopt so expansive an interpretation of the statute. *See, e.g., Maine Ass'n of Interdependent Neighborhoods v. Commissioner of Maine Dep't of Human Services*, 876 F.2d 1051 (1st Cir. 1989); *McGlynn v. Employers Commercial Union Ins. Co. of America*, 386 F. Supp. 774 (D.P.R. 1974).

As a body, the cases cited by IBR construe "person" under §1442(a) to include any individual or entity acting "under", "with", or "on the advice or suggestion of" a federal officer. Such a broad construction embraces a far larger body of cases than those in which claims are asserted directly against federal officers or agencies; its possible limits are difficult to decipher. Indeed, it would seem to embrace virtually every case in which a sovereign immunity defense, and perhaps many other federal defenses, were asserted, because there would always be some relationship to a federal officer from which the asserted defense flowed. Those cases of the group that have squarely addressed the proper construction of the statute follow the reasoning of *Allen v. Allen*, 291 F. Supp. 312, 313 (S.D. Iowa 1968), which permitted removal by the Iowa Medical Service, on the theory that "[s]ound policy requires the availability of a federal forum for adjudication of the legal status of **persons who colorably have been acting under federal direction.**" (emphasis supplied). *Allen* concluded that because Congress had "steadily enlarged" §1442(a) removal, while otherwise restricting federal removal jurisdiction, §1442(a) "is not to be given a strict interpretation." *Id.* Such reasoning violates first principles requiring strict construction of jurisdictional statutes.

To put by the compass of the statutory language would be to follow Respondents into a maze of countless claims whose limits cannot be discerned. *Cf., Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936). Strictly construed, §1442(a) provides a right of removal only for persons, such as employees, working "under" a federal officer, and not for anyone "colorably . . . acting under federal direction." Neither Tulane nor IBR would fit within its reach.

It is Petitioners' argument that the Fifth Circuit has misinterpreted or ignored the language and legislative history of this statute, and the persuasive analysis of the majority of courts, which afford a right of removal to

federal officers, but not to federal agencies or their business colleagues.

C. Federal interests will not be impaired by a remand of this case to state court.

NIH's argument that plaintiffs sued "the wrong party in the wrong court" begs the real question. The question presented by this case is whether the federal courts may exercise removal jurisdiction over an action brought against an agency in state court. Even if the answer is affirmative this is not to say, in fairness, that the state court was the "wrong" court. Indeed, the state law claims could only have been brought in state court, and removal would only be proper if the state court were the "right" court, enjoying jurisdiction that could be transferred to the federal court.[5] And whether NIH is "the wrong party" is a sovereign immunity question – the precise federal question to be decided in either state or federal court **after** the jurisdictional issue is decided. If there

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[5] *See Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841 (1983); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382, 42 S.Ct. 349, 351 (1922). The derivative nature of federal removal jurisdiction raises a question whether removal was proper in this case. Because NIH was not served in state court (later accepting service in federal court), the state court did not have jurisdiction over NIH. If the NIH's sovereign immunity defense is considered jurisdictional, *see Lambert Run Coal Co., supra*, the state court may also have lacked subject-matter jurisdiction over the claims against NIH. *But compare, Brooks v. Dewar*, 313 U.S. 354, 360 (1941); *Wheeldin v. Wheeler*, 373 U.S. 647, 664 n.13 (1963) (dissenting opinion of Brennan, J.), suggesting that sovereign immunity may not be a jurisdictional defense. *See also* 28 U.S.C. §1441(e) (eliminating any derivative jurisdictional defect relating to the *claim*). If, however, the state court lacked jurisdiction over NIH, the federal district court may not have derivatively acquired jurisdiction by removal.

were no sovereign immunity issue, then regardless of the agency's right to remove under §1442(a), there could be no removal here under *Mesa v. California*, 489 U.S. 121, 129 (1989), which established that "federal officer removal must be predicated on the allegation of a colorable federal defense."[6]

If the cart could be put before the horse as NIH urges, the fact that plaintiffs may have sued "the wrong party" (the agency), would not convert this into a suit against "the right party" (an officer). Rather, if sovereign immunity were a legitimate defense, it would bar the plaintiffs' action against both NIH **and** its officers. Therefore, if the cart were placed before the horse, it would have to be advanced to a position where neither a federal officer nor a federal agency were properly sued. Only state claims against private parties would then remain and there could be no question that state court was the "right" court.[7] This, however, is the wrong analysis. Unless NIH's sovereign immunity defense is considered a jurisdictional issue, *see* note 4, *supra*, it could not properly be addressed until the jurisdictional issue raised under §1442(a) was decided.[8] Respondents' argument that the

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[6] The instant case was removed before the *Mesa* decision was handed down. NIH filed successive removal petitions, none of which asserted the presence of a colorable federal defense. Shortly after the case was removed, however, NIH filed successive motions to dismiss, asserting a host of federal defenses, some of which were patently frivolous and all of which were rejected, save the standing argument, which was upheld by the Fifth Circuit. Before this Court, NIH asserts only the sovereign immunity defense and standing argument.

[7] . . . Unless this Court adopted the argument that Tulane was a "person acting under" an officer of the United States, enjoying an independent right to remove.

[8] Jurisdictional issues must always be resolved first. NIH's argument, in fn. 4 of its brief, that this Court has no jurisdiction to entertain the jurisdictional issue under §1442(a) because

(Continued on following page)

state court is the wrong court to decide the immunity issue presupposes both an ambiguity in the removal statute and a policy favoring determination of immunity questions in federal court. As noted in the preceding section, Respondents are wrong in their first presupposition. They are also wrong in their second.

Under the Supremacy Clause, state courts have a constitutional obligation to uphold federal law, and this Court has repeatedly expressed its confidence in their ability to do so. *Allen v. McCurry*, 449 U.S. at 105. Nor is the immunity defense raised by Respondents a novel one for the federal courts to entrust to state courts. In *Gully v. First National Bank*, 299 U.S. 109 (1936), the Mississippi State tax collector sought to recover in state court state taxes levied against a national banking association. The defendant removed the case to federal court, claiming that it arose "under the constitution or laws of the United States" because the state tax laid upon the national bank was impermissible under federal law. Referring to this dispute as "doubtful and conjectural," the Court found it "unavailing to extinguish the jurisdiction of the states." *Id.* at 117. Speaking for the majority, Justice Cardozo wrote:

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government.

Id. Gully elevated the underlying issue of state power in our federal form of government over the issue of federal

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Petitioners' allegedly lacked Article III standing to sue is fallacious. Obviously, Article III standing would not be required if the federal courts lacked removal jurisdiction; and this Court clearly has jurisdiction to determine its own jurisdiction. 13A Wright, Miller and Cooper *Federal Practice & Procedure* §3536 (1984).

immunity. More than fifty years later, this Court approved *Gully's* priorities, stating in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989), involving a tribal immunity defense, "it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law."

While Section 1442(a) provides an extraordinary protection for federal **officers**, which allows their immunity defenses to be heard in federal court, it cannot be inferred from this that Congress intended **agency** immunity defenses to be heard in federal court as well. The same state courts that have been entrusted with the responsibility of adjudicating federal defenses in Section 1331 cases can certainly adjudicate them in cases where a federal agency has been sued. There is no sound policy reason for determining the states' capacity to decide a federal question depending on whether a federal agency is involved. The decision to provide a federal forum to a federal officer, an individual whom Congress feared could be subjected to personal harassment in state courts, does not logically compel a conclusion that Congress would offer a similar option to an agency, whose inevitable bureaucratic structure would offer substantial insulation against personal harassment.

NIH argues that the distinction Petitioners draw between officers and agencies is illusory in this injunction suit where NIH **and its officers** were enjoined from killing the Silver Spring Monkeys. Two interesting ironies inhere in this argument. First, the injunction against NIH and its officers was issued not by the state court, whose allegedly rapacious grasp defendants seek to avoid, but **by the federal court,** for whose "protection" they are clamoring. Pet. A-16. Second, the federal court that issued the injunction **rejected** the federal defenses that defendants claim only the federal court could be trusted to entertain fairly. Pet. A-17, A-18. In any event, the fact that

a suit against an agency results in an injunction binding on the agency's officers does not eliminate the distinction between a suit commenced against an agency as opposed to one commenced against an officer. Where the agency only is named as a defendant, an officer would only be directly and personally subjected to the state court's authority if he **violated** a court order. The same would be true if a federal officer violated a court order entered against a private entity or individual.[9]

NIH contends, however, that the plaintiff should not have the power to determine the forum by the simple – and in Respondents' view, meaningless – expedient of naming an agency instead of an officer. The plaintiff would not in actuality be determining the forum. His state-law claim(s) could only be brought in state court. He might, however, deprive a federal defendant of the option of removal depending upon whether he named a federal officer or a federal agency as a defendant. According such a jurisdiction-determining choice to a plaintiff is neither foreign nor inimical to the federal system. In the vast majority of cases in which defendants base removal on the alleged presence of a federal question[10], the allegations of the plaintiffs' well-pleaded complaint, and not the existence of federal defenses or underlying issues, determine the right of removal. The plaintiff, then, is the

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[9] If the federal, like the state, temporary restraining order had issued only against Tulane, and an NIH officer, acting as Tulane's agent, euthanized the monkeys in violation of the order, in that case too, the federal officer would be answerable to the state court, although there had been no order against the agency or its officers.

[10] An exception to the general rule is provided, for example, where federal law has preempted the area occupied by the plaintiff's state law claims. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). In this case NIH asserted in the district court a preemption claim that it did not reurge in the Fifth Circuit or before this Court.

master of his petition and of the jurisdictional consequences of the choices made in the petition. *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986), and cases cited therein; *Great N. Ry. Co. v. Alexander*, 246 U.S. 276 (1918). There is nothing unseemly in the plaintiff's enjoying such an option.[11]

Similarly, in choosing to name a federal agency instead of its officers, the plaintiff may determine the forum. The choice of agency over officer will not necessarily be a meaningless one. Like the plaintiff who drafts his petition to forego a federal claim, the plaintiff who names an agency instead of an officer may forego certain rights and remedies.[12]

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[11] The plaintiff also has a choice of forum in diversity cases. Where diversity of citizenship exists and the jurisdictional amount is in controversy, the plaintiff may file his state-law suit in state or federal court under 28 U.S.C. §1332. The defendants, however, do not enjoy as extensive a right of removal: removal will be defeated if any defendant is a citizen of the state in which the action was brought. 28 U.S.C. §1441(b).

[12] Respondents suggest that it is nonsensical to distinguish between the right of removal of an officer of an agency and that of the agency itself, because there are some instances where a statutory grant is afforded to sue an agency and other instances in which an officer of the agency is to be sued. Closer scrutiny of such instances reveals that the grant does not necessarily confer parallel or interchangeable abilities to sue. For example, Respondents point to 15 U.S.C. §634(b)(1), concerning the Small Business Administration. The enumerated powers of the agency are divided between the Administrator and the Administration, *id.* at 634(a). The Administrator may sue and be sued in state or federal court "[i]n the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter" *id.* at 634(b). The Small Business Administration "is not a separate 'sue and be sued' agency." *United States v. Skipper Smith's Marina, Inc.*, 283 F. Supp. 408,

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If an action brought by the plaintiff in state court is non-removable, the defendant raising federal issues is not unprotected. First, there is the state court's obligation to uphold federal law under the Supremacy Clause. Second, there is this Court's power to review the state court's decision of a federal issue. *See Merrell Dow Pharmaceuticals*, 478 U.S. at 816; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S., 1, 12, n.12 (1983). Third, in extraordinary cases, the federal defense may be tested in federal court under the Declaratory Judgment Act, 28 U.S.C. §2201. *See, United States v. Pennsylvania Dep't of Envtl. Resources*, 923 F.2d 1071 (3d Cir. 1991).[13]

Therefore, not only does the statute fail to provide the right of removal Respondents exercised in this case,

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409 (S.D. Fla. 1968) and is "clothed with the same prerogatives or immunities of a sovereign except to the extent that they have been waived by statute." *United States v. Inciardi*, 258 F. Supp. 837, 839 (W.D. Okla. 1966).

[13] NIH cites this case, *sub nom., United States v. PADER*, as an illustration of the need for federal agencies to have access to the federal courts for the determination of federal defenses. The Navy brought the action in federal court, alleging that its sovereign immunity defense to an environmental suit brought in state court had not been properly adjudicated in that court. In deciding that discretionary jurisdiction under the Declaratory Judgment Act should be exercised, the Third Circuit emphasized the fact that state law permitted enforcement of the order issued against the Navy pending determination on the merits of the sovereign immunity defense. Had that not been the case, the court made clear, the existence of a pending action in state court where the federal defense could be adjudicated would have precluded the exercise of federal jurisdiction. *PADER* thus stands for the propositions that: 1) a federal forum is only necessary in the extraordinary case where state law precludes effective determination of a federal defense; and 2) a remedy is already provided for those extraordinary circumstances under the Declaratory Judgment Act, so that enlargement of §1442(a) is not required.

which militates against judicial inquiry into the soundness of the statutory policy, but also there is no compelling policy reason for creating a right of agency removal.

D. Sound policy reasons dictate the adjudication of state claims against an agency in state court.

In *Colorado v. Symes*, 286 U.S. 510, 518 (1932), the Court observed, "it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it." *See also Arizona v. Manypenny*, 451 U.S. 232, 243 (1981). The removal statute, the *Symes* Court counseled, "is to be construed with highest regard for such equality."

Louisiana's interest in this case is beyond question. The suit was brought by local and national animal welfare groups, in state court and under state law, to protect animals within the state, housed in a state facility. The claims, grounded in Louisiana's public policy against cruelty to animals, local tort law, and equitable principles deriving from the Napoleonic Code, unquestionably fall within the peculiar bailiwick of Louisiana state courts. Weighed against the local nature of the dispute and causes of action is the interest of NIH – a party whose legal interest has been seriously disputed by both the Petitioners and the federal district court[14] – in plying its defense of sovereign immunity.

One of two results must flow from this Court's definitive interpretation of Section 1442(a): either the state courts must handle the federal immunity defense or the federal courts must handle the state claims. The state

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[14] *See* Section E at pp. 19-23 of Petitioners' Brief on the merits.

courts' competence to address federal issues was discussed in preceding sections. The prospect of the federal courts' handling state claims has received little attention in Respondents' briefs. As the present case demonstrates, there are serious problems inherent in the result Respondents advocate.

First, the federal issues are likely to be disposed of quickly, leaving behind only the fundamental state law claims. In the present case, this might have occurred in one of two ways: if the sovereign immunity defenses were upheld, resulting in a dismissal of the action against NIH, the federal court would be left with state claims against private parties, with no remaining federal issues. Similarly, if the sovereign immunity defenses were rejected, the federal court would be left with state claims and no viable federal issues. In either case, whatever interest the federal courts might have had in adjudicating the case would be quickly eviscerated. What then? In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), a divided Court determined that a federal court whose jurisdiction was based upon the existence of a federal claim that had been dismissed would have the discretion to remand state-law claims over which it had exercised pendent jurisdiction. Whether the same result would obtain in a case removed under Section 1442(a), after disposition of the federal defense(s), is unclear.[15] More certain is the wisdom of *Carnegie-Mellon's* recognition "that a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating

[15] In the decision below, the Fifth Circuit reasoned that because the right of removal under §1442(a) is "absolute", unlike removal under §1441, where the discovery of a jurisdictional defect would require remand, a plaintiff's lack of Article III standing required dismissal of his claims, not remand. 895 F.2d at 1061.

parties" 484 U.S. at 349-350. These difficulties would be particularly acute if remand were not available.

As the instant case revealed, however, other requirements peculiar to the federal court system may trench upon the principle of comity to the states and the promotion of justice between the litigating parties. Here, the issue of remand was never reached, even though the district court rejected NIH's sovereign immunity and other federal defenses. Nor could remand have been considered because Petitioners were found not to have met the requirements of standing imposed by Article III of the Constitution. No such requirements were imposed by Louisiana's more liberal standing doctrine. Thus, an action that could have been maintained in the state court where it was brought was dismissed by the federal court to which it was removed over the Petitioners' objection. Moreover, the action was dismissed for want of Article III standing despite the failure of the federal defense on which the removal depended. Indeed, had the district court addressed the jurisdictional issue of standing first, as the Fifth Circuit did, Petitioners' action might have been dismissed before the federal defenses could even be tested.

The harshness of this anomalous result is aggravated by the possibility that NIH has no legal interest in the case and hence that its sovereign immunity defense is unfounded – or worse, fraudulent. This possibility presses for a clarification of precisely what *Mesa* meant by its declaration that "federal officer removal must be predicated on the allegation of a **colorable** federal defense." 489 U.S. at 129 (emphasis supplied). As *Mesa* recognized, the requirement of a "colorable" federal defense is one of Constitutional stature: Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution, *id.* at 136 and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983); and the presence of a colorable federal defense supports Article III "arising under" jurisdiction for cases

removed under §1442(a). *Mesa v. California*, 489 U.S. at 136. To premise jurisdiction on a frivolous or fraudulent federal defense may be to strain the statute beyond its constitutional limit.

Respondents are stretching the language and perhaps the constitutional underpinnings of Section 1442(a) to their limits, all to the end that plaintiffs will be denied any hearing, in state or federal court, on claims brought in state court under state law to enforce state public policy. Respondents' reading of the statute does violence to principles of comity and fairness to the litigants, only to spare NIH the professed discomfort of litigating in state court issues the state court is competent to determine.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed, and the case remanded to the district court for purposes of remand to the state court.

Respectfully submitted,

MARGARET WOODWARD
BAR NO. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: (504) 525-9538
Attorney for Petitioners International Primate Protection League and its Members, People for the Ethical Treatment of Animals and its Members, Alex Pacheco, and Louisiana in Support of Animal and its Members

OF COUNSEL
GARY L. FRANCIONE
Rutgers-The State University
of New Jersey
School of Law-Newark
15 Washington Street
Newark, New Jersey 07102

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